

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MICHAEL A. SELONKE,

Plaintiff/Appellee,

v

MICHIGAN NATIONAL BANK,

Defendant/Appellant/Cross-Appellee,

and

MICHIGAN EMPLOYMENT SECURITY  
COMMISSION,

Defendant/Appellee/Cross-Appellant.

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UNPUBLISHED

March 19, 1999

No. 201514

Wayne Circuit Court

LC No. 96-623896 AE

Before: Neff, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Defendant Michigan National Bank (MNB) appeals by leave granted from the circuit court's order reopening plaintiff's claim with the Michigan Employment Security Commission (MESC) and remanding the case to the MESC referee for further proofs to be taken on the issue of whether plaintiff made certain threats or engaged in criminal acts. Defendant MESC has filed a cross-appeal, agreeing with MNB that the circuit court's decision should be reversed. We reverse the circuit court's order and reinstate the MESC referee's denial of plaintiff's request for reopening.

I

Plaintiff was initially determined to be entitled to unemployment benefits by the MESC referee following MNB's termination of plaintiff's employment as a service technician. MNB appealed the determination, and an evidentiary hearing was held on the issue of whether plaintiff was disqualified from receiving benefits because he was discharged for engaging in misconduct.

At the hearing, Jason Trautz, MNB's vice-president of technical services, testified that plaintiff yelled vulgarities and obscenities at him and made certain statements which Trautz interpreted as threats. Plaintiff admitted making some of the statements, but denied making others. The referee reversed the prior MESC determination and ruled that plaintiff had engaged in misconduct and was therefore disqualified from receiving benefits. Plaintiff requested a rehearing, which the referee denied. Plaintiff failed to timely appeal the referee's decision to deny a rehearing. Plaintiff filed an untimely appeal, which the board of review dismissed for lack of jurisdiction.

Plaintiff later made a second request for a rehearing, which the referee treated as a request for a reopening of the case. Plaintiff contended that he had not been aware before the hearing of the allegation that he had threatened Trautz, and that plaintiff had a witness who would clear him of this allegation. The referee denied plaintiff's request for reopening because plaintiff failed to establish good cause. On appeal, the board of review affirmed the referee's decision. Plaintiff appealed the board's decision to the circuit court. The Court found that plaintiff's alleged threats against Trautz' life was a new issue that took plaintiff by surprise, and that plaintiff should have had an opportunity for an adjournment. Therefore, the court ordered that the case be remanded to the referee for a full hearing on the alleged threats. This appeal followed.

## II

Defendants argue on appeal that the circuit court erred in its decision because plaintiff failed to establish good cause to warrant reopening his claim. We agree.

We will reverse a decision by the MESC Board of Review where it is either contrary to law or not supported by competent, material, and substantial evidence on the whole record. MCL 421.38(1); MSA 17.540(1); *Vanderlaan v Tri-County Hospital*, 209 Mich App 328, 331; 530 NW2d 186 (1995). Moreover, the decision whether to grant a reopening is within the referee's discretion, 1988 AACCS, R 421.1212(4), and will thus be reviewed on appeal for an abuse of discretion.

MCL 421.33(1); MSA 17.532(1) provides as follows:

The referee may, *for good cause*, reopen and review a prior decision of a referee and issue a new decision after the 30-day appeal period has expired. However, a request for review shall be made within 1 year after the date of mailing of the prior decision.<sup>[1]</sup>  
[emphasis added.]

See also 1988 AACCS, R 421.1212. Although "good cause" is not defined in the statute, 1988 AACCS, R 421.1109 provides that "good cause" includes, but is not limited to, the following:

- (a) Newly discovered material evidence.
- (b) A legitimate inability to act sooner.
- (c) A failure to receive a reasonable and timely notice, order, or decision.

(d) Untimely delivery of a protest, appeal, or a commission document by a business or governmental agency entrusted with delivery of mail.

(e) Having been misled by incorrect information from the commission, referee, or board of review.

Here, plaintiff has not established good cause. Plaintiff asserted in his request for reopening that he was the highest paid service technician for MNB. This assertion has no bearing on the issue involved in the referee hearing, i.e., whether plaintiff had engaged in misconduct. Plaintiff also claimed that he had been unaware of the allegations concerning his threatening behavior before the referee hearing, and that he had a witness who could clear him of the allegations. However, plaintiff did not show that he had newly discovered material evidence since there is no indication that plaintiff was unaware of this allegedly exculpatory witness at the time of his original hearing.

Moreover, plaintiff has not shown a legitimate inability to act sooner. Plaintiff was notified that the issue at the hearing would be misconduct, and had an opportunity to call any witnesses he wished at the hearing. In addition, the record before us indicates that the written document of termination plaintiff received from MNB stated that plaintiff had used profanity and obscenity and had “verbally attacked” the vice president. Without question, making threats to one’s superior at work constitutes misconduct. At the hearing, plaintiff admitted to making some of the statements which Trautz perceived to be threats. It is thus disingenuous for plaintiff to claim that he was surprised that MNB was claiming that plaintiff made remarks to the vice president of a threatening nature, and that this threatening behavior would constitute part of the misconduct that was at issue in the hearing. We hold that plaintiff has not established good cause on these facts.

The circuit court appears to have decided that good cause was established because a new issue arose at the hearing when Trautz accused plaintiff of making threats against his life, and that the referee failed to adjourn the hearing or obtain a knowing and informed waiver of adjournment from the parties. See 1988 AACS, R 421.1206. We disagree.

A new issue did not arise at the referee hearing. The allegations of threats did not constitute a new issue, but rather, were merely allegations in support of the issue stated on the notice of hearing, i.e., misconduct. The basic issue of whether defendant was discharged for misconduct remained the same. We thus conclude that a new issue did not arise at the referee hearing, and that plaintiff did not establish good cause to warrant reopening his claim.

Having resolved the case on this basis, we find it unnecessary to address the other issues raised by defendants.

The circuit court's order is reversed, and the board of review's decision affirming the referee's denial of plaintiff's request for reopening is reinstated.

/s/ Janet T. Neff

/s/ Michael J. Kelly

/s/ Harold Hood

<sup>[1]</sup> It is arguable that plaintiff's request for reopening was not timely since it was filed on June 1, 1994, more than one year after the referee's original decision on March 1, 1993. However, the board of review indicated that plaintiff's request for reopening was timely because the board of review had previously misinformed plaintiff of the final date on which he could file a request for reopening. We need not consider whether plaintiff's request was timely because, in any event, good cause has not been shown.